INDEX

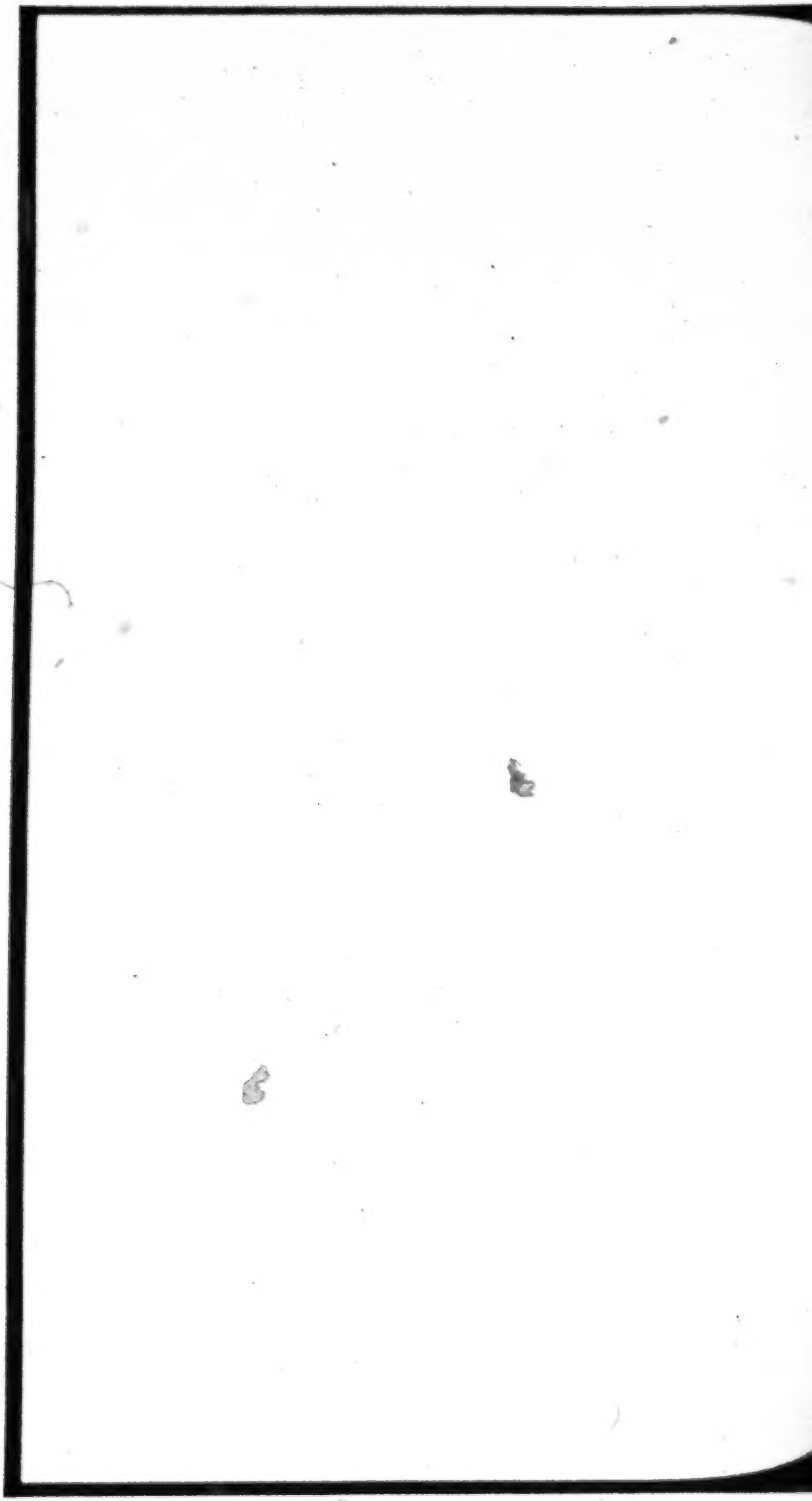
CITATIONS

Cases:

Cases—Continued

Miscellaneous—Continued

Miscellaneous—Continued



In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1082

REUBIN O'D. ASKEW, ET AL., APPELLANTS

v.

THE AMERICAN WATERWAYS OPERATORS, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

OPINION BELOW

The opinion of the three-judge district court (App. 39-55) is reported at 335 F. Supp. 1241.

JURISDICTION

The district court entered its order and final judgment enjoining enforcement of the Florida Oil Spill Prevention and Pollution Control Act of 1970, ch. 70-244, on December 10, 1971 (App. 48). Appellants filed their notice of appeal on December 23, 1971

(J.S. 2, J.S. Addendum). Probable jurisdiction was noted on April 17, 1971 (405 U.S. 1063). This Court's jurisdiction rests upon 28 U.S.C. 1253.

QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether Section 12 of the Florida Act is valid insofar as it seeks to subject vessels to unlimited liability for damage from oil spills or discharges.
2. Whether Section 12 of the Florida Act is valid insofar as it subjects terminal facilities to unlimited liability for damages from oil spills or discharges.
3. Whether Section 12 of the Florida Act is valid insofar as it makes vessels and terminal facilities covered by the Act liable without fault for damage caused by their discharge or spilling of oil.
4. Whether Florida may validly require certain equipment to be carried by ships visiting its ports in order to prevent damage from oil spills.
5. Whether Florida may validly require certain equipment to be carried by terminal facilities within the State in order to prevent damage from oil spills.

STATUTORY PROVISIONS INVOLVED

The Florida Oil Spill Prevention and Pollution Control Act, ch. 70-244, is set forth in the Appendix, at pp. 56-73.

The pertinent provisions of the Water Quality Improvement Act of 1970, 84 Stat. 91, as amended,

33 U.S.C. 1161-1175, are set forth in the Appendix, at pp. 75-90.

The pertinent provisions of the Limitation of Liability Act, 9 Stat. 635, as amended, 46 U.S.C. 181-189, are set forth in the Appendix, at pp. 91-92.

INTEREST OF THE UNITED STATES

The substantial interest of the United States in the prevention and control of oil spills from ships and waterfront facilities is indicated by federal legislation and pending international conventions dealing with the matter, which we discuss *infra*. The Court's decision in this case is likely to have a significant impact on the implementation and enforcement of these federal regulatory measures and on federal-state relationships with respect to oil pollution control.

STATEMENT

This is an appeal from the decision of a three-judge district court holding unconstitutional the Florida Oil Spill Prevention and Pollution Control Act of 1970, ch. 70-244. Florida passed the Act for the purpose of preventing and controlling oil spills into the State's navigable waters and to provide for recovery of damages incurred by the State and private persons as a result of such spills. The Act applies to all "terminal facilities" (any waterfront facility used for drilling for oil or handling the transfer or storage of oil from ships) within the State, Section 3(9), and to all ships destined for or leaving those facilities, Section 12.

With respect to oil discharges from terminal facilities and ships, Section 12 of the Act provides that the State may recover, on behalf of itself and private persons, all damages incurred as a result of the spill and that, in such cases, it shall not be necessary for the State to prove negligence. Section 11(6)(c), however, confers discretion upon the state Department of Natural Resources to allow the owner of a terminal facility or vessel to be relieved of liability if the spill resulted from an act of war, an act of God, an act of government, or the act or omission of a third person. Each owner or operator of a ship or terminal facility covered by the Act must establish evidence of financial responsibility by insurance or a surety bond, under regulations promulgated by the responsible state agency.[1]

Other provisions of the Florida Act set up a comprehensive regulatory scheme concerning the equipment and operations of terminal facilities and ships visiting Florida ports, to be administered by the state Department of Natural Resources. The state agency is authorized to require, through regulations, that facilities and ships have certain oil containment gear on hand, Section 7(2)(a) and (g), and that ships allow the state port manager to board for the purpose of determining the ship's seaworthiness and whether proper containment gear is being carried, Section 7(2)(c).

---

[1] The regulations (App. 73-74) require shipowners to establish and maintain evidence of financial responsibility in an amount not to exceed $100 per gross ton of the ship or $5,000,000, whichever is less.

Terminal facility owners or operators must procure a license from the state agency, which shall be issued upon the applicant's showing that he "can provide all necessary equipment to prevent, contain and remove discharges of oil and other pollutants," Section 6(6). The state agency also has the responsibility to set up a system for reporting prohibited discharges, Section 7(2)(b), to develop a plan to cope with oil pollution when it occurs, Section 7(2)(e), and to coordinate cleanup efforts with the federal government, Section 8. Violation of the Act or any regulation issued thereunder is punishable by a civil penalty of not more than $50,000, Sections 10 and 16.[2] The agency is financed from the Florida coastal protection fund, to which shall be credited all license fees and penalties, Section 11.

Section 23 provides that all provisions of the Florida Act are severable and that if any provision is held unconstitutional, the decision shall not affect the other provisions.

Merchant shippers using Florida ports, maritime insurers, the Florida barge and towing industry, and terminal facility owners brought suit against the State and its officers in the United States District Court for the Middle District of Florida, challenging the Florida Act on federal constitutional and statutory grounds, and seeking an injunction against its enforcement (App. 1-26). Pursuant to 28 U.S.C. 2281, a three-judge court was convened.

---

[2] The penalty provisions do not apply to any discharge promptly reported and removed in accordance with the agency's regulations.

The court held the entire Florida Act "null and void and without effect" and enjoined its enforcement (App. 47). The court noted that federal "[m]aritime law governs virtually every facet of the shipping industry" and that there is extensive federal legislation in the area, including the Water Quality Improvement Act of 1970 (WQIA), 84 Stat. 91, 33 U.S.C. 1161-1175, which subjects owners of vessels or terminal facilities to liability without fault up to $14,000,000 or $8,000,000, respectively, for cleanup costs incurred by the federal government as a result of oil spills, and which authorizes the President to issue regulations requiring that vessels and terminal facilities maintain equipment to prevent spills (App. 40-41).

In the court's view, the Florida Act would constitute an unwarranted intrusion into federal admiralty jurisdiction. It would subject shipowners to far greater liability than that imposed by the WQIA and, unlike the WQIA, would not allow shipowners to defend on the basis that the oil spill was caused by an act of God, an act of war, or the act or omission of a third party (App. 42). Moreover, the court believed that the Florida Act would alter general maritime law, under which recovery in oil spill cases would be allowed only if the injured party proved that the ship had been negligently operated or equipped (App. 42-43).

Citing *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, the court concluded that "[i]t is well settled that state legislation is invalid where it is in con-

travention with general admiralty rules * * *" (App. 43), and that here the Florida Act would destroy uniformity with respect to maritime affairs (App. 44). The court rejected the argument that in the absence of a federal statute or definite maritime rule on the subject, state law must govern (App. 46).

Although the Florida Act contains a severability clause, the court struck down the entire statute because all of the provisions were "interwoven in purpose and scheme" (App. 47).

SUMMARY OF ARGUMENT

I

A

The federal Limitation of Liability Act, 9 Stat. 635, as amended, 46 U.S.C. 181-189, limiting recovery to the value of the ship and her pending freight, governs the extent of a shipowner's liability for injuries caused by the ship, including oil spills. Under the Supremacy Clause, Section 12 of the Florida Act can not extend the limits set by this federal Act. However, we do not believe Section 12 should be declared invalid in this regard since it is susceptible of an interpretation that would avoid any conflict with federal law; this Court should leave open the opportunity for a state court to interpret Section 12 as subjecting shipowners to liability for all damages up to the maximum set by federal law.

B

1. The Florida law is valid insofar as it subjects operators of terminal facilities to unlimited liability

for damage from oil spills. The federal Limitation of Liability Act apples only to vessels, and the federal Water Quality Improvement Act of 1970 (WQIA), 33 U.S.C. 1161-1175, although limiting a terminal facility owner's liability to the United States for clean-up costs, does not deal with liability to States and private persons for damages caused by oil spills. Moreover, even if a discharge of oil from a terminal facility were considered a maritime tort and thus subject to general maritime law, there would be no conflict with Section 12 of the Florida Act since the terminal facility owner would not, in any event, be able to limit his liability under federal law. The Florida law in this regard at most merely restates present federal law.

2. We believe Section 12 of the Florida Act to be valid insofar as it sets the standard of recovery against shipowners and terminal facility owners as liability without fault.

a. Although a vessel's discharge of oil into navigable waters could be considered a maritime tort, it is not clear that the standard of liability would be negligence as the court below assumed. This area of maritime law might, in light of current trends, develop a theory of liability without fault. But even if negligence is considered to be the present standard, there is no policy of maritime law opposed to liability without fault for damages caused by oil spills from ships.

On the other hand, Florida has a legitimate interest in applying its own standard of liability in view

of the potential impact of oil spills on its environment and economy. There may be substantial difficulties in proving negligence in such cases, particularly since the only witnesses may be employees of the vessel operator and since the acts resulting in the spill may have been committed far away from the area of the coast affected. Further, Florida could properly conclude that liability without fault would encourage a higher degree of care with respect to ships destined for and leaving ports within the State. Since these are the only ships covered by Section 12, Florida law also reflects the State's legitimate policy judgment that such ships, using Florida ports for profit, should bear the burden of loss if their oil damages the State's environment and citizens, even if the ship had taken due care to prevent an accident.

Although application of Florida's standard of liability might create a lack of uniformity in general maritime law, this is not a subject requiring uniform, federal regulation. The primary conduct of those engaged in maritime affairs would not be affected since federal law already requires vessels to exercise the highest degree of care to prevent oil spills. In addition, there would be no unwarranted disruption in the financial planning of shipowners or their insurers since, as we have argued above, the federal Limitation of Liability Act would govern the extent of recovery, thereby giving notice of the limits of the shipowner's liability before the ship's voyage begins.

b. The considerations we have just summarized with respect to vessels are, for the most part, all

the more applicable to terminal facilities; the Florida law regarding the standard of liability for oil spills is therefore valid as applied to the owners of such facilities.

C

International Conventions, currently pending before the Senate, provide that shipowners shall be liable without fault to governments and private persons for damages caused by oil spills. Under these Conventions, shipowners may limit their liability to $15 million but persons or governments injured to a greater extent may recover up to $32.4 million from an international fund established by the Conventions. Moreover, recovery may be had against the fund even if the shipowner would have a defense and even if the person injured cannot identify the source of the oil spill. Although we believe these Conventions, if ratified, would supersede state laws regarding liability for oil spills from ships, we are of the view that in the meantime Florida's liability provision validly governs such liability to the extent indicated above.

II

A

The Florida Act directs the state agency to require ships to carry certain "containment gear". However, diverse equipment regulations for ships from state to state would pose an unreasonable burden on maritime commerce and under *Kelly* v. *Washington*, 302 U.S. 1, 15, state law cannot govern in this area even in the absence of any federal regulations.

The matter will not, however, be unregulated since the WQIA confers authority upon the President to establish requirements for equipment on ships to prevent discharge of oil. Pursuant to this authority, the Coast Guard has published extensive and detailed proposed regulations, which will shortly become final. Also, recent amendments to 46 U.S.C. 391a give the Coast Guard broad regulatory authority over equipment and appliances on ships to prevent and mitigate damage to the marine environment. Pub. L. 92-340, Section 201, 92d Cong. (July 10, 1972). Although these comprehensive federal laws suggest that Congress has occupied the field and thus preempted the States from acting in this area, we believe it unnecessary to resolve this question because under *Kelly* the States would be precluded from regulating equipment on ships even in the absence of federal legislation on the subject.

B

The Florida Act also directs the state agency to regulate equipment on terminal facilities in order to prevent damage from oil pollution. Section 7(2)(g). Both the WQIA and the federal Ports and Waterways Safety Act of 1972 confer similar regulatory authority upon the President; and the Coast Guard, acting under the WQIA, has published extensive proposed regulations dealing with the subject of the equipment and operations of terminal facilities. 36 Fed. Reg. 24960. However, the WQIA and the Ports and Waterways Safety Act recognize state authority to act concurrently in this area to a limited extent and

the latter statute specifically provides that States may require higher safety standards than those prescribed by the Coast Guard. Therefore, since Florida has not yet promulgated regulations dealing with equipment on terminal facilities and since the Coast Guard's proposed regulations are not yet final, we believe it would be inappropriate for the Court to attempt, at this time, to define the precise extent of Florida's authority in this area, especially since the Florida Act may be interpreted to allow the State to act only in conformity with the WQIA and the Ports and Waterways Safety Act, thereby avoiding any conflict with federal law.

ARGUMENT

I

SECTION 12 OF THE FLORIDA ACT CANNOT SUBJECT SHIPOWNERS TO UNLIMITED LIABILITY FOR OIL SPILLS BECAUSE OF CONFLICTING FEDERAL LAW, BUT IS VALID INSOFAR AS IT SUBJECTS OWNERS OF TERMINAL FACILITIES TO UNLIMITED LIABILITY AND SETS THE STANDARD OF RECOVERY AGAINST OWNERS OF SHIPS AND TERMINAL FACILITIES FOR OIL SPILL DAMAGES AS LIABILITY WITHOUT FAULT

A. The Federal Limitation of Liability Act Limits the Liability of Shipowners For Their Ships' Torts Despite Contrary State Law

Because of a conflict with federal law, Section 12 of the Florida Act (App. 68-69) is, in our view, ineffective (under the Supermacy Clause in Article

VI of the Constitution) insofar as it purports to subject shipowners to unlimited liability for damages caused by oil discharged from ships. The federal Limitation of Liability Act,[3] enacted in 1851 in order to put American shipping in competitive equality with British shipping,[4] provides that the liability of the owner of a vessel shall not exceed his interest in the ship and her pending freight[5] when the ship causes injury without his "privity or knowledge."[6]

There is no doubt that the Limitation of Liability Act applies to damages caused by oil spills from ships, even if the injury occurs on shore.[7] In *Ex parte Phenix Insurance Co.*, 118 U.S. 610, where sparks from a ship's smokestack caused a fire on shore, the Court held that the shipowner's liability was not limited since the federal Act applied only to maritime torts, which traditionally this was not because the injury was consummated on land. Later, however, in *Richardson* v. *Harmon*, 222 U.S. 96, where a ship collided with a bridge and the shipowner was

---

[3] 9 Stat. 635, as amended, 46 U.S.C. 181-189.

[4] See 23 Cong. Globe 331-332, 713-720, 776-777 (1851).

[5] *Norwich Co.* v. *Wright*, 13 Wall. 104, held that, for purposes of the Act, the owner's interest must be valued after the accident or loss, not at the beginning of the voyage.

[6] 46 U.S.C. 183(a); see *Coryell* v. *Phipps*, 317 U.S. 406; Gilmore and Black, *The Law of Admiralty* 663-748 (1957).

[7] The Water Quality Improvement Act of 1970, 33 U.S.C. 1161-1175, creates an exception to the Limitation of Liability Act with respect to recovery by the federal government for the costs of cleaning up oil discharged by ships. See p. 16 n. 12, *infra*.

sued under state law, the Court decided that an 1884 amendment to the Act, see 46 U.S.C. 189, extended its coverage to include non-maritime torts.

As thus interpreted, the federal Limitation of Liability Act limits a shipowner's liability for oil spills whether the injury is consummated onshore or off. But under appellants' interpretation (Br., pp. 6, 33), Section 12 of the Florida Act purports to impose unlimited liability upon shipowners in such situations. There is thus a direct conflict between federal and state law, and the federal law prevails. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210-211; *Richardson* v. *Harmon*, *supra*.

We do not believe, however, that it necessarily follows that this portion of Section 12 of the Florida Act should be declared invalid. The statute does not mention the phrase "unlimited liability," but instead states only that vessels and terminal facilities that discharge oil or other pollutants "shall be liable to the state for all costs of cleanup or other damage incurred by the state and for damages resulting from injury to others" (App. 68). No Florida court has yet interpreted this provision[8] and it appears likely that when and if the question does arise, the state court would consider Section 12 in light of the federal Limitation of Liability Act and interpret it accordingly. Cf. *Lake Carriers' Association* v. *McMullan*, No. 71-422, decided May 30, 1972, slip op.

[8] The Florida certification procedure was not utilized in this case. See *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 377.

at p. 13. This could result in a construction that shipowners are liable under Section 12 for all damages up to the maximum set by federal law. Since there would in that event be no conflict with the Limitation of Liability Act,[9] this Court should leave open the opportunity for such a construction by declaring only that if Section 12 is interpreted to impose liability without limit upon shipowners, it must give way to the federal Limitation of Liability Act.[10]

B. Florida's Subjection of Terminal Facilities to Unlimited Liability And Imposition of Absolute Liability As the Standard of Recovery Against Ships And Terminal Facilities Are Valid

In all other respects, we believe that Section 12 of the Florida Act is valid.

---

[9] The Court has often warned against "seeking out conflicts between state and federal regulation where none clearly exists." *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 446.

[10] The court below did not separately discuss Section 14(1) of the Florida Act, requiring owners of terminal facilities or vessels to maintain evidence of financial responsibility with the State pursuant to rules and regulations promulgated by the Florida Department of Natural Resources. The regulations now require vessel owners to establish financial responsibility "in an amount not to exceed $100 per gross ton of such vessel or $5,000,000 whichever is lesser" (App. 74).

Since these regulations were presumably based on the premise that shipowners are subject to unlimited liability under Section 12 of the Florida Act, it is reasonable to expect that they will be revised if, as we urge, this Court holds that the federal Limitation of Liability Act limits the amount of recovery against shipowners, despite Section 12 of the Florida Act.

1. *Unlimited liability with respect to terminal facilities.* The provision in Section 12 of the Florida Act dealing with the extent of liability applies not only to oil spills from vessels, which we have discussed above, but also to oil spills from "terminal facili[ties]." [11] In contrast, the federal Limitation of Liability Act applies only to "vessels," see 46 U.S.C. 183(a), and the Florida Act, insofar as it imposes unlimited liability upon terminal facilities, is therefore not in conflict with this federal Act.

Nor do we believe this aspect of the Florida Act to be in conflict with the federal Water Quality Improvement Act of 1970 (WQIA), 84 Stat. 91, 33 U.S.C. 1161-1175, which provides that an owner or operator of an offshore or onshore facility shall be liable to the United States in an amount not to exceed $8,000,000 for the costs incurred by the United States in cleaning up oil discharged by the facility.[12] 33 U.S.C. 1161(f)(2).[13] Section 12 of the Florida

---

[11] Section 3(9) defines "terminal facilit[ies]" to include onshore and offshore facilities for "drilling for, pumping, storing, handling, transferring, processing, or refining oil or other pollutants * * *" (App. 59).

[12] Similar liability, limited to $100 per gross ton or $14,000,000, whichever is less, is imposed upon vessels. 33 U.S.C. 1161(f)(1).

[13] The owner or operator is relieved of liability to the United States if he proves "that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses * * *." 33 U.S.C. 1161(f)(2).

Act concerns liability to the State and private persons for damage caused by oil spills—a subject not regulated by the WQIA, which deals only with liability to the federal government. Moreover, the WQIA specifically states that it shall not "affect or modify" the obligations of "any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly-owned or privately-owned property resulting from a discharge of any oil or from the removal of any such oil." 33 U.S.C. 1161 (o)(1). And the WQIA further provides that it shall not preempt any State from imposing "any requirement or liability with respect to the discharge of oil into any waters within such State." 33 U.S.C. 1161(o)(2).

Thus, the Florida law is valid in this regard unless for some other reason the Supremacy Clause deprives the State from holding terminal facilities liable for all recoverable damages for oil spills. In our view, the only possible basis for doubt about the State's authority on this matter would be that suits dealing with oil spills from terminal facilities into navigable waters may be within the federal admiralty jurisdiction, even if the source of the oil spill is land-based and not a "vessel," [14] and that state law cannot serve as the decisional rule in such cases because it offends general maritime law. However,

[14] Terminal facilities are not "vessels" under general maritime law. See *Rodrigue* v. *Aetna Casualty Co.*, 395 U.S. 352, 360.

the point is immaterial here. For there is no federal law, statutory or otherwise, limiting the liability of terminal facilities for damages to a State or a private individual. Thus, even if an action for damages caused by a terminal facility's discharge of oil onto navigable waters were considered a maritime tort in all cases,[15] Section 12 of the Florida Act merely restates the present maritime law insofar as it provides that there is no limitation on recovery for damages from owners or operators of such facilities.

2. *Liability without fault for oil spills from vessels and terminal facilities.* As far as Section 12 of the Florida Act is concerned, the only remaining question is whether the standard of recovery set forth in that provision—liability without fault—would govern in suits for damages from oil spills against vessels and terminal facilities covered by the Florida Act, or whether, instead, general maritime law must control. The question is important because, at least since

---

[15] Compare *Firemen's Fund Insurance Co.* v. *Standard Oil Co. of Cal.*, 339 F. 2d 148 (C.A. 9), with *The Plymouth*, 3 Wall. 20, 35 (in order for there to be a maritime tort "the wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within the admiralty jurisdiction"), and *Executive Jet Aviation, Inc.* v. *City of Cleveland, Ohio*, 448 F. 2d 151 (C.A. 6), certiorari granted, 405 U.S. 915; *Peytavin* v. *Government Employees Insurance Co.*, 453 F. 2d 1121 (C.A. 5).

The Admiralty Extension Act, 46 U.S.C. 740, which in part overruled *The Plymouth*, *supra*, applies only to damages caused by vessels. See *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202.

Southern Pacific Co. v. *Jensen*, 244 U.S. 205, decided in 1917, this Court has adhered to the principle that, in maritime cases, the same law must be applied regardless of whether suit is brought in the federal admiralty court or in state court under the "savings clause" of 28 U.S.C. 1333(1). See *Romero* v. *International Term. Co.* 358 U.S. 354, 373-374. And when state law differs from the general maritime law, the relevant state and federal interests should be considered in determining which law should prevail.[16]

a. *Vessels.* The court below correctly recognized that a vessel's discharge of oil into navigable waters could be considered a maritime tort,[17] even if the injury were consummated on land.[18] But it is less clear what the standard of liability would, or should, be for this type of maritime tort. While general maritime tort law is doubtless rooted in negligence,[19] admiralty courts have also imposed strict liability,[20] particularly in regard to injuries to seamen under the concept of "maintenance and cure" and to long-

---

[16] See generally Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 Sup. Ct. Rev. 158.

[17] See Gilmore and Black, *The Law of Admiralty* 21 (1957); *State, Department of Fish and Game* v. *S.S. Bournemouth*, 307 F. Supp. 922, 924 (C.D. Cal.).

[18] Before 1948, when the Admiralty Extension Act, 46 U.S.C. 740, took effect, the causing of damages onshore by a vessel in navigable waters did not constitute a maritime tort. *The Plymouth*, 3 Wall. 20; *Cleveland Terminal R.R.* v. *Steamship Co.*, 208 U.S. 316.

[19] See *The Clara*, 102 U.S. 200.

[20] See McCoy, *Oil Spill and Pollution Control: The Conflict Between State and Maritime Law*, 40 G.W. L. Rev. 97, 108 (1971).

shoremen and others under the doctrine of "unseaworthiness." [21] And if one searches for common law analogues to the discharge of oil by vessels, there is the well-known English case of *Rylands* v. *Fletcher*, 3 H.L. 330 (1868), where the court held the defendant strictly liable for the escape of water from his dam onto another's land, and thereby fostered the idea that enterprises should pay for damages resulting from their enterprise, especially when the activity conducted for profit involves risks despite the observance of due care.[22] With the recent enactment of the Water Quality Improvement Act, 33 U.S.C. 1161-1175, federal legislation at least has moved in that direction in regard to oil spill cleanup costs incurred by the federal government. Moreover, Congress has declared in that Act "that it is the policy of the United States that there should be no discharges of oil into or upon the navigable waters of the United States," 33 U.S.C. 1161(b)(1), and general maritime law surely would take this declaration of national policy into account.[23]

---

[21] See, *e.g.*, *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 93-95.

[22] See Morris on *Torts* 240-255 (1953); see also *Green* v. *General Petroleum Corp.*, 205 Cal. 328, holding the owner of an oil drilling operation liable for damages caused by a blowout even though the drilling was not conducted negligently.

[23] See *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, indicating the influence of legislation on the development of general maritime law. Cf. Selvig, *Towards Strict Shipowner Liability: Recent Trends in Norwegian Law on Maritime Torts*, 2 J. Maritime L. and Comm. 383 (1971).

[Footnote continued on page 21]

Nevertheless, whether the general maritime law would develop a negligence theory of recovery or, instead, a type of liability without fault is difficult to predict.[24] But even if one assumes, as did the court below (App. 42-43), that the standard of liability for this kind of maritime tort is negligence, there is nothing in the general maritime law to indicate a negative policy opposed to liability without fault in such cases.[25]

---

[23] [Continued]

See also the Refuse Act of 1899, 33 U.S.C. 407, making it a criminal offense to discharge refuse into the navigable waters of the United States. *United States* v. *Standard Oil Co.*, 384 U.S. 224, held that "refuse" includes oil.

[24] The question may become moot in any event if the Senate ratifies the pending *International Convention on Civil Liability for Oil Pollution Damage*, Exec. Doc. G, 91st Cong., 2d Sess., at pp. 19-27 (1970), which provides that a shipowner shall be liable for all pollution damage caused by oil that has escaped or been discharged from his ship, unless he proves that the damage resulted from an act of God, an act of war, negligence of any government responsible for maintaining navigational aids, or an act or omission by a third party with intent to cause damage. *Id.* at 20. See also *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*, Exec. Doc. K, 92d Cong., 2d Sess., pp. 1-20 (1972), which allows compensation in addition to that provided by the Civil Liability Convention and allows recovery in additional cases (*e.g.*, spills caused by an act of God). See pp. 27-29, *infra*.

[25] The state law is therefore not invalid under the principle of *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 409-410 ("While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court.").

On the other hand, there are substantial state interests underlying Florida's imposition of absolute liability. Florida found, as Section 2 of the Act states, that oil pollution poses grave and immediate dangers to the State's seacoast, and, as a consequence, threatens the State's environment, the owners and users of shorefront property, the livelihood of those within the State who derive their living from marine-related activities, and the beauty of the Florida coast, which the State considers best used as a source of public and private recreation (App. 56-57).

In light of the potential impact of oil spills on the environment and economy of the State, we believe Florida has a legitimate concern for the application of its own law regarding the basis for liability.[26] If the standard of negligence would otherwise control, this could present serious obstacles to the granting of some measure of compensation for damages suffered by the State and its citizens from oil spills. The problems of proof of negligence in such cases are obvious. Employees of the vessel operator may be the only witnesses to the spill; it may be difficult to determine precisely why the spill occurred; and the acts resulting in the spill may have been committed far away from the damaged beach or the particular area of the coast affected.[27]

---

[26] Other States have also imposed liability without fault with respect to oil spills from ships. See Note, *Toward a State Remedy for Oil Spill Damages: An Insurance Approach*, 47 N.Y.U. L. Rev. 60, 65 n. 29 (1972).

[27] See Note, *Toward a State Remedy for Oil Spill Damages: An Insurance Approach*, 47 N.Y.U. L. Rev. 60, 61 (1972).

In addition, Florida could properly conclude that the standard of absolute liability rather than negligence would encourage a higher degree of care. It is relevant here that the liability-without-fault provision in Section 12 of the Florida Act applies only to ships destined for or leaving terminal facilities within the State. Since these vessels thus have a significant nexus with the State and are operating for profit by using Florida ports, the State's regulatory measure legitimately expresses Florida's policy judgment that such ships should bear the burden of loss if the State's beaches are fouled with oil from the ship, even if due care is taken to prevent a mishap. Florida has, in short, legislated within the traditional bounds of the police power in order to protect its citizens and their environment.[28]

Of course, if Florida law rather than the general maritime law controls, this might lead to a lack of uniformity with respect to the standard of liability for oil pollution by ships. But that, in itself, does not necessarily mean general maritime law must prevail. Insofar as *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 216, held that state law may never interfere with the uniformity of maritime law, the "case has already been severely limited, and has no vitality beyond that which may continue as to state workmen's compensation laws." *Standard Dredging Co.* v. *Murphy*, 319 U.S. 306, 309.[29] Instead, "[u]ni-

[28] See *Gibbons* v. *Ogden*, 9 Wheat. 1; *Huron Cement Co.* v. *Detroit*, 362 U.S. 440.

[29] See also *Wilburn Boat Co.* v. *Fireman's Fund Insurance Co.*, 348 U.S. 310, 321 n. 29.

formity is required only when the essential features of an exclusive federal jurisdiction are involved." *Just* v. *Chambers*, 312 U.S. 383, 392; see also *Romero* v. *International Term. Co.*, 358 U.S. 354, 373. Cf. *Cooley* v. *Board of Wardens*, 12 How. 298; *Willson* v. *Black-bird Creek Marsh Co.*, 2 Pet. 245.

Whether a state law must fall "because the subject is one as to which uniformity of regulation is required," *Kelly* v. *Washington*, 302 U.S. 1, 14, requires a balancing of the particular state and federal interests involved;[10] in this respect, the issue is not unlike that presented in cases dealing with the validity of state laws affecting interstate commerce. Indeed, in maritime cases involving state regulatory measures to maintain health, safety or the general welfare, this Court has often spoken in terms of the Commerce Clause, rather than admiralty jurisdiction.[11]

We have already discussed the important state interests and the policies underlying Section 12 of the Florida Act. As against this, there is the federal concern, identified by the Court in *The Roanoke*, 189 U.S. 185, 195, that "it is almost impossible for [the master] * * * to acqaint himself with the laws of each individual State he may visit * * *." But this consideration has little force here. The federal Water Quality Improvement Act puts vessels on notice that

---

[10] See Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 Sup. Ct. Rev. 158, 170-174.

[11] Currie, *Federalism and the Admiralty, supra*, at 170; see, *e.g.*, *Kelly* v. *Washington*, 302 U.S. 1, 14-16; *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 448.

they are expected to exercise utmost care in preventing oil spills;[22] the imposition by various coastal States of strict or absolute liability in place of a negligence standard under general maritime law would simply reinforce the ship's preexisting duty. There would thus be no prejudicial effect on the primary conduct of those engaged in maritime affairs resulting from a lack of uniformity in this area of maritime law.

Nor do we believe that Florida's law must fall on the basis that absolute liability rather than negligence would unreasonably expose shipowners to vast liability to the detriment of the federal interest in promoting maritime commerce. As we have argued above (pp. 12-15, *supra*), the federal Limitation of Liability Act now limits the extent of recovery against a shipowner despite contrary state law. Likewise, the standard of liability set by a State cannot extend the maximum amount recoverable against a shipowner. Thus, if Florida's liability standard applied, the shipowner would nevertheless know the limits of his liability before the ship's voyage began and he would also know that this would not change from state to state even if, in different states, the basis for recovery varied. A lack of uniformity therefore would not cause any unwarranted disruption in the financial planning of persons engaged in maritime affairs or their insurers. In sum, since application of Florida's absolute liability standard would not contravene the federal interest in the general har-

---

[22] See pp. 13 n. 7, 16, 20, *supra*.

mony of maritime affairs, and since the State has a substantial stake in having its law applied, we believe the district court erred in striking down this provision in Section 12 of the Florida Act.[33]

b. *Terminal facilities.* What we have just said with respect to vessels is all the more applicable to terminal facilities, where the connection with the State is even greater and where there appears to be even less need for uniformity since terminal facilities do not move from state to state as do ships. Nor do damages from terminal facilities to other shore installations fall within the admiralty jurisdiction. See *Rodrigue* v. *Aetna Casualty Co.*, 395 U.S. 352, 360-361.

---

[33] Federal law provides criminal penalties for the discharge of oil by ships in certain instances, but Section 12 of the Florida Act is not inconsistent since it provides a civil remedy. The federal criminal provisions are:

(1). The Oil Pollution of the Sea Act of 1961, as amended, 33 U.S.C. 1001-1015, implementing the 1954 International Convention for the Prevention of the Pollution of the Sea by Oil. The Act prohibits oil discharges by ships in certain territorial zones incident to normal operations, but does not apply to the discharge of oil to prevent damages to the ship or the escape of oil resulting from damage to the ship. 33 U.S.C. 1003. Violations are a misdemeanor and are punishable by a fine not exceeding $2,500 nor less than $500. 33 U.S.C. 1005.

(2). The Refuse Act of 1899, 33 U.S.C. 407, which provides that any discharge from a ship of "any refuse matter of any kind or description whatever" into any navigable water of the United States shall be punishable by a fine not exceeding $2,500 nor less than $500, or imprisonment not less than thirty days nor more than one year, or both, 33 U.S.C. 411. See *United States* v. *Standard Oil Co.*, 384 U.S. 224 (the Act applies to oil spills).

3. *Summary.* We conclude, therefore, that Section 12 of the Florida Act is ineffective insofar as it purports to subject ships to unlimited liability contrary to the federal Limitation of Liability Act, but that a state court may interpret Section 12 to be consistent with the federal Act; that Section 12 merely restates existing law insofar as it subjects terminal facilities to unlimited liability and is therefore not invalid in this respect; and that Section 12's imposition of absolute liability on ships and terminal facilities for oil spills is a proper exercise of the State's police power and should be given effect despite the lack of uniformity with general maritime law on this subject that might result. Accordingly, the judgment of the court below, striking down the entire Florida Act primarily because of the alleged unconstitutionality of Section 12, should be reversed.[34]

C. International Conventions Now Pending Before the Senate Would, If Ratified, Significantly Affect the Questions Discussed Above Regarding the Liability of Ships For Damage Caused By Oil Spills

Many, if not all, of the questions discussed above will be significantly affected if pending international Conventions dealing with oil pollution of the seas by

---

[34] The Florida Act also contains a provision allowing direct actions against insurers of vessels or terminal facilities, see Section 14(3) (App. 70), which the court below did not separately discuss. In itself, this provision appears to be valid under *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409. (The federal Water Quality Improvement Act also contains a direct-action provision that the federal government may invoke to sue the shipowner's insurer for cleanup costs. 33 U.S.C. 1161 (p)(3).)

ships, which the President has transmitted to the Senate,[35] are ratified.

The 1969 Convention on Civil Liability establishes rules regarding the liability of oil-carrying vessels to governments and private persons for damages from oil pollution. The shipowner is liable for such damages in all cases unless he can show that the oil spill was caused by (a) an act of God, (b) an act of war, (c) an act done with intent to injure or with negligence by the party suffering damages or a third person, or (d) negligence of a government. Under procedures specified in the Convention, the owner may limit his liability per incident to $144 per gross registered ton or $15 million,[36] whichever is less, unless the incident occurred as a result of his fault or privity. Ships are required to maintain insurance or other evidence of financial responsibility to cover potential liability under the Convention. In addition to the United States, eighteen other countries had signed the Convention at the time of its transmittal to the Senate.[37]

---

[35] *Presidential Message Transmitting Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage and Amendments to the 1954 Prevention of Pollution of the Sea by Oil Convention*, Exec. Doc. K, 92d Cong., 2d Sess. (1972) [hereinafter "1971 Convention"]; *Presidential Message Transmitting Two Conventions and Amendments Relating to Pollution of the Sea by Oil*, Exec. Doc. G, 91st Cong., 2d Sess. (1970) [hereinafter "1969 Convention"].

[36] See note 38, *infra*.

[37] See *1969 Convention, supra*, Exec. Doc. G, at 4-5.

The 1971 Convention supplements the 1969 Convention on Civil Liability and sets up an international Compensation Fund. If a shipowner has limited his liability under the 1969 Convention, the Fund will pay for additional damages up to an aggregate of $32.4 million.[38] Also, the Fund will pay governments or private persons up to this amount even in cases where the shipowner would have a defense because the damage resulted from an act of God, the act or omission of a third person, or negligent maintenance of navigational aids by a government. Compensation up to this amount is also available where the claimant cannot identify the particular ship from which the oil escaped. The Fund is financed by payments required from receivers of oil importing more than a specified amount per year. In addition to the United States, eleven other countires had signed this Convention at the time of its transmittal to the Senate.[39]

If ratified, these Conventions will, under the Supremacy Clause, supersede state laws regarding liability for oil spills from ships. However, we are of the view that in the meantime Florida's liability provision is valid to the extent indicated in our previous discussion.

---

[38] Since the Convention sets limits according to a gold standard, these dollar figures take account of the Par Value Modification Act, P.L. 92-268, 92d Cong.

[39] *1971 Convention, supra,* Exec. Doc. K, at VI. We are informed that as of August 1972, a total of 28 countries in addition to the United States had signed or ratified this Convention.

II

FLORIDA MAY NOT IMPOSE REQUIREMENTS WITH RESPECT TO THE EQUIPMENT CARRIED ON SHIPS FOR CONTAINING OIL SPILLS, BUT THE EXTENT OF THE STATE'S REGULATORY AUTHORITY OVER TERMINAL FACILITIES SHOULD NOT BE DECIDED IN THIS CASE

A. Since Uniform Regulations Are Necessary in Regard to the Equipment And Fittings Required On Ships Plying the Navigable Waters of the United States, This Is an Area For Exclusive Federal Regulation And Individual States Cannot Impose Their Own Requirements

Section 7(2)(a) of the Florida Act directs the state Department of Natural Resources to formulate regulations "requiring that vessels transporting pollutants within state waters shall maintain on board such containment gear as may be required by the department with a crew trained in the use of such gear" (App. 62).[40] In our view, this provision of the state law is invalid under the commerce and admiralty clauses of the Constitution because the subject sought to be regulated—containment equipment on ships—requires uniform, federal regulation. The Court's holding in *Kelly* v. *Washington*, 302 U.S. 1, 15, is, we believe, controlling on this issue:

> If, however, the State goes farther and attempts to impose particular standards as to structure, design, equipment and operation which in the judgment of its authorities may be desirable but

[40] Section 7(2)(d) of the Act also requires regulations prescribing "Procedures, methods, means, and equipment to be used by persons subject to regulation by this act and to be used in the removal of pollutants" (App. 63).

> pass beyond what is plainly essential to safety and seaworthiness [of the ship], the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule.

Here, Florida has authorized its Department of Natural Resources to require certain "containment gear" on ships entering and leaving Florida ports. By "containment gear" Florida may mean equipment to contain and prevent the spreading of oil spills that have occurred. But there are numerous kinds of equipment systems in various stages of development for this purpose, including *inter alia* the "dynamic keel" oil containment system,[41] pneumatic barriers using air bubbles,[42] and various types of "booms."[43] And the obvious difficulty is, as the Court pointed out in *Kelly*, *supra*, 302 U.S. at 15, that Florida "might prescribe standards, designs, equipment and rules of one sort, [Maine] another, [New York] another, and so on."[44] By "containment gear" Florida may also mean fittings and equipment to

---

[41] See March, *"Dynamic Keel" Oil Containment System*, in *Proceedings of Joint Conference on Prevention and Control of Oil Spills* (sponsored by American Petroleum Institute, July 15-17, 1971).

[42] See Basco, *Pneumatic Barriers for Oil Containment under Wind, Wave and Current Conditions*, in *id.* at 381.

[43] See Marks, Geiss and Hirshman, *Theoretical and Experimental Evaluation of Oil Spill Control Devices*, in *id.* at 393.

[44] By contrast, the Smoke Abatement Code of the City of Detroit upheld in *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, did not require any particular equipment on ships, but merely provided for the application to ships of standards for maximum allowable smoke emissions in the City.

prevent oil seepages and spills from leaving the ship. Here again diverse equipment regulations for ships from state to state would unreasonably burden maritime commerce.

Thus, even in the absence of federal law on the subject, we believe that, under *Kelly* v. *Washington*, *supra*, States cannot impose their own requirements regarding containment equipment on ships.[45] We add, however, that the inability of the States to act in this area will not leave the matter unregulated. The federal Water Quality Improvement Act, 33 U.S.C. 1161 (j)(1), authorizes the President to issue regulations "establishing procedures, methods, and requirements for equipment to prevent discharges of oil from vessels and from onshore facilities and offshore facilities," and regulations governing inspection of vessels to reduce the likelihood of discharges of oil. With respect to ships, the Coast Guard has published, pursuant to this authority, extensive and detailed proposed regulations, a sample of which we have set forth in the margin,[46] dealing with the kind of equip-

---

[45] Florida's regulation of containment gear does not come within the exception in *Kelly* allowing States to inspect ships entering their ports in order to insure safety and seaworthiness, since this exception applies only in regard to vessels that are "actually unsafe and unseaworthy in the primary and commonly understood sense," 302 U.S. at 15, which does not include ships with containment gear different from that required by Florida or without any containment gear on board.

[46] § 155.310 Cargo oil discharge containment.

(a) After December 31, 1974, no person may operate a tank vessel that is carrying oil that has a tank capacity

for 10,000 U.S. gallons or more of oil unless it has—

(1) Fixed containers or enclosed deck areas that meet the requirements of this section under or around each oil loading manifold and each oil transfer connection area; and

(2) A means of draining or removing discharged oil from each container or enclosed deck area.

(b) Each drain and scupper in an enclosed deck area required by this section must have an attached means of closing.

(c) Each fixed container or enclosed deck area must hold, in all conditions of vessel list or trim, to be encountered during the loading operation at least—

(1) 100 U.S. gallons if it serves one or more 6-inch nominal diameter or smaller hose or loading arm connections;

(2) 150 U.S. gallons if it serves one or more hose or loading arm connections larger than 6 inches, but less than 12 inches, nominal diameter; or

(3) 200 U.S. gallons if it serves one or more 12-inch or larger nominal diameter hose or loading arm connections.

* * * * *

§ 155.320 Fuel oil discharge containment.

After December 31, 1974, no person may transfer oil for fuel to a vessel of 100 gross ton or more unless—

(a) It has a fixed container or enclosed deck area of at least 14 U.S. gallons capacity under or around each fuel tank vent, overflow, and fill pipe; or

(b) Each fuel tank vent, overflow, and fill pipe is located where a portable container that is at least 18 inches deep and has at least 14 U.S. gallons capacity can be placed under it.

* * * * *

§ 155.400 Valves.

After December 31, 1974, no person may operate a vessel of 100 or more gross tons unless—

[Footnote continued on page 34]

ment and fittings ships must carry in order to contain oil and prevent spills. 36 Fed. Reg. 24960."

Further, under recent amendments to 46 U.S.C. 391a, enacted after the decision below, the Coast Guard is authorized, "[i]n order to secure effective provision * * * for protection of the marine environment," to establish regulations for ships[48] "with respect to equipment and appliances for * * * the prevention and mitigation of damage to the marine en-

---

[46] [Continued]

(a) It has a valve in each fixed overboard bilge and ballast discharge line except a line used only for discharges from spaces free from sources of oil;

(b) It has a positive means of closing each valve required by paragraph (a) of this section at the valve if it is accessible and—

(1) On or above the freeboard deck of a vessel that is required to have a freeboard deck under 46 CFR 43.05-1 (g); or

(2) On or above the main deck of a vessel that does not have a freeboard deck;

(c) Each valve required by §§ 155.340, 155.350, 155.370, 155.380, and paragraph (a) of this section has a positive means of being sealed in the closed position; and

(d) Each valve required by §§ 155.340, 155.350, 155.370, 155.380, and paragraph (a) of this section is conspicuously identified by a label on or next to the valve and each remote means of closing the valve.

* * * * *

[47] The Coast Guard informs us that these regulations are now being reviewed and revised and will be formally issued by the end of 1972.

[48] The amendments cover ships carrying oil or other liquid pollutants.

vironment * * *." Pub. L. 92-340, Section 201, 92 Cong. (July 10, 1972).[49]

Together these recent amendments and the proposed regulations under the federal WQIA indicate that federal law has so occupied the field that the States are preempted from acting in this area.[50] But in our view this question need not be resolved since state laws prescribing containment equipment on ships would be invalid even in the absence of federal legislation on the subject.

B. Although Recent Federal Legislation Gives the United States Authority to Regulate the Operations of And Equipment On Terminal Facilities, Congress Recognized the States' Concurrent Authority To Act In This Area And the Extent of Florida's Authority In this Respect Cannot Now Be Appropriately Determined Since Neither the State Nor the Federal Government Has Yet Promulgated Regulations Governing Terminal Facilities

In order to prevent oil spills, the Florida Act also requires regulation of equipment relating to the use and operation of terminal facilities. Section 7(2)(g) (App. 64). In striking down the entire Florida Act, the court below did not specifically discuss Section 7(2)(g). We believe it would be inappropriate for

---

[49] The Coast Guard has not yet promulgated regulations under Section 201 of Pub. L. No. 92-340, *supra*.

[50] The provision in the WQIA preserving state authority and declaring that the Act does not preempt state law "imposing any requirement or liability with respect to" oil spills, see p. 17, *supra*, does not appear to apply to laws regarding the regulation of equipment on ships. See 33 U.S.C. 1161(o)(1) and (2).

this Court now to pass on the constitutionality of this provision since its validity may substantially depend upon how Florida seeks to exercise the regulatory authority conferred therein and upon what regulations are promulgated by the United States Coast Guard under the recently-enacted Ports and Waterways Safety Act of 1972, Pub. L. 92-340, Title I, 92d Cong. (July 10, 1972), and under the Water Quality Improvement Act, 33 U.S.C. 1161(j)(1), see 36 Fed. Reg. 24960.[51]

The federal Ports and Waterways Safety Act authorizes the Coast Guard to "prescribe minimum safety equipment requirements for structures subject to this title to assure adequate protection from fire, explosion, natural disasters and other serious accidents or casualties"; the purpose of such requirements is "to protect the navigable waters and the resources therein from environmental harm * * *." *Id.*, Section 101(7).[52] Pollution of navigable waters from oil spills provided the impetus for this legislation,[53] and there is no doubt that the federal Act and the

---

[51] Present Coast Guard regulations pertaining to "waterfront facilities" are contained in 33 C.F.R. 126.

[52] The "structures" covered by the federal Act are those "on or in the navigable waters of the United States, or any land structure or shore area immediately adjacent to those waters * * *." *Id.*, Section 101. This appears to be coextensive with coverage under the Florida Act, which defines "terminal facility" as "any waterfront facility of any kind" used for drilling, pumping, or handling oil. Section 3(9) (App. 58-59).

[53] See H. Rep. No. 92-563, 92d Cong., 1st Sess., 2-7 (1971).

Florida Act overlap with respect to the regulation of terminal facilities in order to prevent such environmental harm. However, rather than preempting this area, Congress left important regulatory authority with the States. Section 102(b) of the Ports and Waterways Safety Act specifically provides that "Nothing contained in this title * * * prevent[s] a State or political subdivision thereof from prescribing for structures only higher safety equipment requirements or safety standards than those which may be prescribed pursuant to this title."

In addition, pursuant to the Water Quality Improvement Act, 33 U.S.C. 1161(j)(1), the Coast Guard has published proposed regulations dealing with equipment on terminal facilities, 36 Fed. Reg. 24960, 24964-24965. These regulations, which have not yet become final,[54] require, among other things, that terminal facilities have equipment to prevent oil from spilling onto the water and to contain oil that has spilled, Section 154.530-154.545, 36 Fed. Reg. 24964; that they have adequate means of communication with the vessel in transfer operations, Section 154.560, 36 Fed. Reg. 24964; and that they have certain kinds of hose assemblies, loading arms and closure devices, Sections 154.500-154.520, 36 Fed. Reg. 24964.

The federal Water Quality Improvement Act, like the Ports and Waterways Safety Act of 1972, *supra*, recognizes state regulatory authority with respect to

---

[54] The Coast Guard expects the regulations, which are undergoing revision, to be issued in final form before the end of 1972.

terminal facilities and specifically provides that federal permits will not be issued to terminal facility operators or owners unless the applicant first supplies a certificate from the State that his operation will be conducted in accordance with state water quality standards. 33 U.S.C. 1171(b)(1).

Thus, determination of the validity of a State's regulations on this subject would require a specific comparison of them with the pertinent federal regulations. But the latter have not yet been adopted by the Coast Guard and we are informed that Florida has not yet promulgated its regulations under Section 7(2)(g). In addition, this portion of the Florida Act may be interpreted to allow the State to act only in conformity with the federal Ports and Waterways Safety Act and the Water Quality Improvement Act, thus avoiding any federal-state conflict. See pp. 14-15, *supra*. It would therefore be premature at this time to pass upon the specific extent of Florida's authority to regulate in this area [55] since, as in *Kelly* v. *Washington*, *supra*, 302 U.S. at 16, "[t]hat question cannot be satisfactorily determined on this record and [should] remain for decision as it may be presented

[55] The federal Ports and Waterways Safety Act, in preserving state authority to require higher safety standards, assumes that the States have preexisting authority to regulate terminal facilities. We believe this assumption to be correct. For the obvious reason that such facilities are stationary, the situation is unlike that with respect to vessels, where the lack of uniform equipment requirements from state to state would be an unreasonable burden on maritime commerce.

in the future in connection with some particular action taken by the state authorities." [56]

---

[56] There may be other areas of potential conflict between the Florida Act and federal law. For example, the Water Quality Improvement Act, 33 U.S.C. 1161(b)(2), exempts discharges of oil in such quantities and places as determined by the President, through regulations, not to be harmful. On the other hand, Section 4 of the Florida Act appears to prohibit all discharges of oil in any quantity upon the State's coastal waters and beaches.

Also, *compare* Section 7(2)(g) of the Florida Act (authorizing regulations setting minimum weather and sea conditions for permitting a vessel to enter and leave port), *with* 46 U.S.C. 91 (clearance to leave port); 33 C.F.R. 124 (Coast Guard regulations on control over movement of vessels issued under Exec. Order 10173); and the Ports and Waterways Safety Act of 1972, *supra* (authorizing the Coast Guard to control vessel traffic in order to prevent environmental harm from vessel damage). (Florida has not yet issued regulations under Section 7(2)(g).)

We believe matters such as these should not be resolved now, but should be "left to be determined when the precise question arises" in the future. *Kelly* v. *Washington, supra,* 302 U.S. at 15.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed insofar as it holds that Florida may not validly regulate equipment on ships, but should be reversed in all other respects since the provisions dealing with the extent of liability of shipowners and the regulation of the equipment operations of terminal facilities may be interpreted to avoid invalidity and since the other provisions we have discussed are valid.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

KENT FRIZZELL,
Assistant Attorney General.

HARLINGTON WOOD, JR.,
Assistant Attorney General.

A. RAYMOND RANDOLPH, JR.,
Assistant to the Solicitor General.

SEPTEMBER 1972.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 475007 101